Supreme Court, U.S.
FILED
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Case No.

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term 1997

FELIPE B. CRUZ,
Petitioner,

vs.

WILLIAM S. COHEN,
Secretary, Department of
Defense, USA,
Respondent.

Petition For A Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit; Appendix

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31 pp

Questions Presented

1.) Must a plaintiff in a Title VII retaliation case present "specific, substantial evidence of pretext" in response to an employer's proffered reasons for an adverse employment decision or else have his case dismissed?

2.) Does Section 102(c)(1) of the Civil Rights Act of 1991 grant a jury trial in actions against the United States of America?

3.) Is it proper to review the denial of a jury trial in a Title VII case under the harmless error standard?

4.) Where a written settlement agreement covers "all claims...arising from... the same subject matter that gave rise to [plaintiff's] lawsuit," must not extrinsic evidence be had to determine what claims are settled?

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Opinions Below

The Court of Appeals' opinions are not officially reported but they are reproduced in the Appendix as Exhibits A and B, pages fifteen and nineteen.

Jurisdiction

Jurisdiction of this court is based on 28 U.S.C. Section 1254, the power to review a final judgment of the United States Court of Appeals.

The trial court's jurisdiction was based on 42 U.S.C. Section 2000e, et seq., the power to hear an action for damages due to discrimination based on race and national origin, and to determine if retaliation for protected activity has occurred.

The Court of Appeals' jurisdiction was based on 28 U.S.C. Section 1291, the power to review a final judgment of the District Court.

Statutes, Constitutions, etc.

1.) 42 U.S.C. Section 2000e-3 makes it unlawful to discriminate against anyone who has complained of discrimination under the Civil Rights Act of 1964.

2.) The Civil Rights Act of 1991 provides in §102(a)(1) that persons may maintain an action for compensatory and punitive damages for intentional discrimination and that they may demand a jury trial. Section 102(c)(1).

Statement of the Case

This is the second of two appeals[1] taken by petitioner Felipe Cruz, who claims here that he was retaliated against by his supervisors for filing the first action for discrimination. (Cruz I and II.) Cruz is an auditor with the Defense Contract Audit Agency of the Department of Defense. He was a GM-13 when he took and passed the test for GM-14 on eight separate occasions, on the last of which he was one of three finalists. When he was not promoted, Cruz, after filing a charge with the Equal Employment Opportunity Commission, sued, claiming that he was discriminated against based on his race (Asian) and national origin (Filipino); he also claimed that his supervisor, Warren Wright, retaliated against him by lowering his performance and promotion appraisals ratings. These two charges -- the failure to promote and the retaliation for challenging the failure -- comprised the complaint in Cruz I.

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[1] This court denied Cruz's petition from the first appeal. 513 U.S. 1146, 115 S.Ct. 1093 (1995).

The appeal in Cruz I claimed that the trial judge, Manuel Real, erred in failing to find a prima facie case on the failure to promote and retaliation claims. The Court of Appeals for the Ninth Circuit in an unsigned memorandum opinion affirmed on the failure to promote claims, but reversed on the retaliation claim, stating that Cruz had shown "a pattern of retaliatory harassment." (Appendix, Ex. B.)

On remand, the parties settled Cruz I for $15,000 in papers drawn by the government, which agreement recites that it extends to "all claims...arising from the same subject matter that gave rise to the lawsuit." The agreement also provided that Cruz's ratings for 1993-1994 would be returned to their 1990 level, prior to Warren Wright's decreases.

In the meantime, Cruz had filed a second complaint alleging that almost all of the discrete acts of discrimination the Court of Appeals had found constituted a pattern of retaliatory harassment were in themselves actionable, Cruz II. Thus, the second complaint alleged seven acts of reprisal and one act of age discrimination for all of which Cruz listed EEOC docket numbers and for which he received right to sue letters in 1994 and 1996, after the Court of Appeals had reversed. That is, Cruz didn't even have the right to sue for the discrete acts of reprisal specified by complaint in Cruz II until after Cruz I had been tried and reversed on appeal. Yet, the government successfully moved for partial summary judgment that barred Cruz from litigating those claims in Cruz II

which the Court of Appeals in Cruz I had found established a pattern of harassment, even though they were not in themselves the subject of the action. However, the Court of Appeals in Cruz II found that the settlement agreement was unambiguous and included all those enumerated claims of Cruz II, even though Cruz could not have sued on them in Cruz I and despite the language of the agreement limiting it to what gave rise to Cruz I.

There remained after the government's partial summary judgment but three claims in Cruz II, one of age discrimination and two for reprisal in job ratings. As to these claims, Cruz had three times requested a jury trial, but Judge Real refused to grant one.

Accordingly, Judge Real, sitting as judge and jury, took evidence relating to Cruz's performance rating reduction in 1991-'92, and to the freeze of his promotion potential rating for 1992-'93. Insofar as relevant here, it is enough to note that Cruz's superiors -- Morimoto and McGrath -- both stated legitimate, nondiscriminatory reasons for their ratings, which Cruz, who tried the case himself, did not challenge by additional evidence of pretext.

On appeal, the Ninth Circuit held that, assuming Cruz had made a prima facie case, he had failed to introduce "specific, substantial" evidence of pretext, without which not even a jury could find in his favor. Accordingly, the court affirmed the judgment, finding the denial of a jury trial was harmless error.

Reasons To Grant The Writ

The Court of Appeals Decided A Federal Question Inconsistently With The Settled Law of This Court And Created A Split of Authority within the Ninth Circuit

A. Inconsistency

In holding that Cruz must supply "specific, substantial" evidence of pretext, the Court of Appeals departs from the settled law of this court.

The only "must" found in this court's opinions is that plaintiff must be given the "opportunity" to show that the proffered reasons of the employer are pretextual. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804. There is no requirement in any Supreme Court case that plaintiff, when given the opportunity, must show "specific" and "substantial" evidence of pretext.

Indeed, Justice Scalia in a recent employment discrimination case states that rejection of the employer's proffered reasons is, together with proof of a prima facie case, enough to permit the trier of fact to find intentional discrimination, no other proof being required. St. Mary's Honor Center v. Hicks, ____U.S.____, 113 S.Ct. 2742, 2749. Again, the burden is limited by Justice Powell, who states that there may be cases where the prima facie case together with cross-examination of the defendant's witnesses will be enough

to discredit the employer's explanation. Texas Dept.of Community Affairs v. Burdine, 450 U.S. 261, 101 S.Ct. 1097, 1095, fn.10. Again, Justice Powell states that plaintiff's burden as to the employer's reasons merges with plaintiff's ultimate burden of persuasion which may be done directly, by persuading the court that intentional discrimination was the motivating factor, or "indirectly, by showing that the employer's proffered explanation is unworthy of credence." (Cits. omitted.) Id., at 1095. Is it not apparent that showing pretext is but one way of carrying the ultimate burden? Surely, if plaintiff were required to show pretext, either Justices Scalia or Powell would have said so.

(i)
The Issue Is
One of Credibility

Closely analogous to the points above -- that no independent evidence of pretext is necessary -- is U.S. Postal Service Bd. of. Govs. v. Aikens, 460 U.S. 711, in which Chief Justice Rehnquist shows that once a prima facie case is made and the employer has offered its reasons, without more, the trier of fact must then proceed to decide which party's explanation of the employer's motivation it believes. Id., at 716. And, indeed, Chief Justice Rehnquist adds that the trier of fact should not make its inquiry even more difficult by applying legal rules which were devised to govern the allocation of burdens and the order of proof. Id., at 716. The implication of such an observation is that the courts should not

add to the burdens established under McDonnell Douglas. Thus no extra requirement of specific and substantial evidence of pretext would appear to be warranted or contemplated under Aikens.

B.
There Is A Split of
Authority In The
Ninth Circuit

Another reason to grant review is the apparent difference in approach represented by Yartzoff v. Thomas, 809 F.3d. 1371, (1986) by Judge Dorothy Nelson, and Wallis v. J.R. Simplot, 26 F.3d. 885, by Judge T. G. Nelson, both of the Ninth Circuit.

In Yartzoff, Judge Dorothy Nelson holds that summary judgment where a prima facie case of discrimination is made under Title VII is generally unsuitable. Id., at 1377. In Wallis, however, Judge T. G. Nelson holds that the mere presentation of a prima facie case is by itself not enough to defeat a summary judgment. Id., at 890. And it is Wallis that the court of appeals relied upon because it quotes a case requiring specific, substantial evidence of pretext. Steckl v. Motorola, Inc. 703 F.2d. 392, 398 (9 Cir. 1983).

Yartzoff is consistent with this court's holdings in McDonnell Douglas, Burdine, and Aikens; Wallis is at odds. That Wallis notes cases in other circuits where more than a prima facie case must be made to defeat a summary judgment simply shows the spread of error and adds urgency to this petition. See cases collected in

Wallis, 26 F.3d., at 890; see also cases collected in University of Southern California v. Superior Court 222 Cal.App.3d. 1028, at 1039.

(i)
A Series of Retaliations
Shows Pretext

Finally, if Cruz was required to show pretext, Yartzoff indicates that the sheer number of retaliations -- 7 -- over a short period of time is itself probative of pretext. No more should have been required. Yartzoff, supra, 809 F.2d., at 1378.

II
The Right To Jury Trial And
The Review of Its Denial
Presents Important
Federal Questions

The irony of the circuit court's action in reviewing the denial of a jury trial here is that it relies upon the only other case to deny a jury, and find it harmless, because plaintiff failed to make a prima facie case. United States v. California Mobile Home Park Management Co., 107 F.3d. 1374, 1380 (9 Cir. 1997). The court here takes the rule and extends it to cover, not the prima facie case -- which its silence would indicate was made -- but to the failure to show evidence of pretext, which as Justices Scalia, Powell, and Rehnquist have been shown to hold is only one way of persuading the trier of fact of the ultimate conclusion -- discrimination, or not, that "elusive" of

inquiries.

We suggest that this cannot be deemed harmless error. As Justice Stevens observed, the jury trial right was granted in a package that responded to and reversed Supreme Court holdings, expanding the scope of relevant civil rights acts in order to provide adequate protection to victims of discrimination. Landsgraf v. USI Film Products, 114 S.Ct. 1483 (1994). Though the grant of a jury trial was not directly in response to any decision, still its presence in a remedial package suggests that it was meant to correct the narrow view the courts as trier of fact were taking. These views are now extended, as Wallis shows, to include cases where, despite a prima facie case, the action is dismissed for failure to introduce independent evidence of pretext. But, as Burdine, St. Mary's and Aikens show, where the employer proffers an explanation, only a question of credibility is presented. We suggest that the denial of a jury trial where a prima facie case is made can never be deemed harmless. Moreover, denial of a jury trial should be considered reversible per se. See, Selby v. McCarthy, 91 Cal.App.3d. 517, 527.

In summary, we can see no difference between the guarantee of a jury trial in a criminal case and the statutory grant in civil rights cases. The denial of either should be considered reversible per se.

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III
The Settlement Agreement Was Ambiguous

Finally, we wish to urge that as the settlement agreement referred without specifying the subject matter that gave rise to Cruz I, it necessarily required extrinsic evidence to determine its meaning. Here, the evidence was unequivocal that Cruz's attorney, and Cruz himself, thought they were settling only the failure to promote and the Warren Wright retaliation claims. Indeed when Cruz's attorney suggested a global settlement of all the claims then pending, the government attorney replied that he only had authority for $15,000, not $30,000. Further, Cruz's act of subsequently filing Cruz II shows that he did not believe those claims were the subject of adjudication in Cruz I.

We know this court does not usually grant review to correct a misapplication of a rule correctly stated. But, here, the circuit contradicts itself by stating that the agreement was unambiguous, and therefore no extrinsic evidence was necessary, yet the court then goes outside the document to identify the claims upon which Cruz had not gotten right to sue letters to include them in the settlement. That is, extrinsic evidence is necessary, and, if that is so, then it must admit all the extrinsic evidence bearing on the parties' intent and not merely that evidence favorable to the government.

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Conclusion

McDonnell Douglas, Burdine, Aikens and St. Mary's Honor Center all show that where a prima facie case of discrimination is made and the employer has proffered its reasons, the trier of fact should then proceed to decide the qustion of who it believes even in the absence of independent evidence showing pretext. No other evidence is needed, certainly not that the explanation is pretextual, as the mere rejection of the proffered explanation is enough to permit the inference of intentional discrimination. There is no presumption that the explanation offered is credible and the real reason, even if it is valid. Accordingly, the failure to introduce "specific" and "substantial" evidence of pretext was not fatal to Cruz's trial. Hence, the decision must be reversed for this reason alone, as it applies incorrect law.

Furthermore, even if the case were subject to a harmless error review, still the denial of a jury trial could not be considered harmless here as a fact question was presented between what Cruz showed and what the employer claimed.

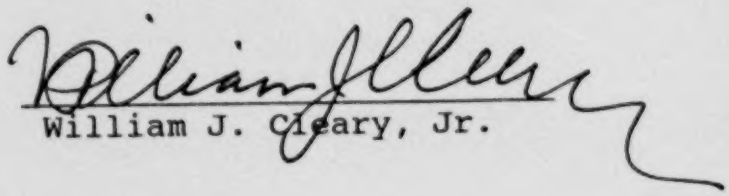
Finally,review should be granted because the court of appeals contradicted itself in holding that extrinsic evidence was unnecessary to interpret the settlement agreement, but at the same time looked outside the document to hold the claims on which Cruz had not yet obtained permission to sue were also barred. If the court admits the evidence favorable to

the government, it must also consider the extrinsic evidence favorable to Cruz.

For all these reasons, Cruz asks the court to grant the writ.

Date: July 16, 1998

Respectfully,



William J. Cleary, Jr.

Appendix

Exhibit A:
Opinion of the Court of Appeals.....15

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Exhibit A:
Opinion Of The Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed May 8, 1998
Cathy A. Catterson, Clerk
U.S. Court Of Appeals

FELIPE B. CRUZ, Plaintiff-Appellant,	)	No. 97-55365 D.C. No. CV-96-1572-R
v.	)	MEMORANDUM*
WILLIAM S. COHEN, Sec'y. of Defense, UNITED STATES OF AMERICA, Defendant-Appellee	)	

Appeal from the United States District Court for the Central District of California
Manuel L. Real, Chief District Judge, Presiding

Submitted March 4, 1998**
Pasadena, California

Before: WIGGINS and KLEINFELD, Circuit Judges and SMITH, District Judge.***

* This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appellant Felipe Cruz appeals the district court's grant of partial summary judgment in favor of the United States on his Title VII and ADEA employment discrimination claims. Cruz contends that the district court erred in finding that claims brought in his second action against defendants were barred by a settlement agreement reached in an earlier action, and by denying him a jury trial. We have jurisdiction pursuant to 28 U.S.C. §1291, and we affirm.

I. Claims Barred by Settlement Agreement

The district court granted summary judgment on several of the claims in Cruz II on the ground that they were barred by settlement agreement in Cruz I. This court relies on local contract law to interpret settlement agreements. See Jeff D. v. Andrus, 899 F.2d. 753, 759 (9th Cir. 1989). Where the contract is unambiguous, no extrinsic evidence is admissible to contradict its meaning. See Pierce County Hotel Employees and restaurant Employees Health Trust v. Elks Lodge, 827 F.2d 1324, 1327 (9th Cir. 1987).

The settlement agreement in this case was unambiguous. It barred "all claims ...arising from...the same subject matter that gave rise to Cruz's lawsuit." Because both cases asserted discrimination and retaliation that occurred at about the same time at the DCAA, the Cruz II claims

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**The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P.34(a) and Ninth Circuit Rule 34-4.

were barred by the settlement agreement regardless of whether they could have been litigated in Cruz I. The district court's grant of summary judgment was proper.

II. Right to a Jury Trial

A plaintiff suing the United States has a right to trial by jury only where Congress has "affirmatively and unambiguously granted that right by statute." See Lehman v. Nakshian, 453 U.S. 156, 169 (1981). Neither the ADEA itself nor any other statute contains such a grant. See id. at 168; Guillory-Wurz v. Brady, 785 F.Supp. 889, 891 (D. Colo. 1992). Cruz was therefore not entitled to a jury trial on his ADEA claim. We assume without deciding that Cruz was entitled to a jury trial on his Title VII retaliation claims.

A district court's failure to use a jury in a civil case is harmless error if, under the evidence presented at trial, no reasonable jury could have found for the appellant. See United States v. California Mobile Home Park Management Co. 107 F.3d. 1374, 1380 (9th Cir. 1997). In order to reach the factfinder, a plaintiff in a discrimination case must present specific, substantial evidence of pretext in response to the employer's proffered reasons for its adverse employment decision. See, e.g., Wallis v. J.R. Simplot Co., 26 F.3d. 885, 890 (9th Cir. 1994). Cruz failed to do so for either of

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***The Honorable Fern M. Smith, district Judge for the Northern District of California, sitting by designation.

his Title VII claims. Any error in denying his request for a jury trial on these claims was therefore harmless. **AFFIRMED.**

Exhibit B:
Opinion Of The Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed September 9, 1994
Cathy A. Catterson, Clerk
U.S. Court Of Appeals

FELIPE B. CRUZ, Plaintiff-Appellant,	)	No. 93-55468 D.C. No. CV-92-03109-R
v.	)	MEMORANDUM*
LES ASPIN, Secretary of Defense, Defendant-Appellee	)	

Appeal from the United States District Court for the Central District of California
Manuel L. Real, Chief District Judge, Presiding

Argued and Submitted August 1, 1994
Pasadena, California

Before: D.W. NELSON, and NOONAN, Circuit Judges, and KING**, District Judge.

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* This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Felipe Cruz ("Cruz") appeals the district court's dismissal of his Title VII discrimination claims against his employer, the Defense Contract Audit Agency ("DCAA" or "Agency"). Cruz, employed as a supervisory auditor (GM-13 level) at the DCAA, alleges that his advancement within the Agency repeatedly has been foiled in recent years, and that he has run into a "glass ceiling" based on his national origin (Filipino) and his race (Asian). Cruz asserts that, since 1986, he has been denied a promotion to a GM-14 position on at least eight separate occasions, and bases his present Title Vii challenge on the DCAA's denial in 1991 of his application for a promotion to the Office Manager position at the DCAA's El Segundo office. Cruz claims that the district court erred both in concluding that he failed to establish a prima facie case of disparate treatment, and in concluding that he failed to establish a prima facie case on his claim that his DCAA supervisors illegally retaliated against him for filing an EEOC complaint. We have jurisdiction under 28 U.S.C. §1291. We affirm in part, reverse in part, and remand for further proceedings.

I. FAILURE-TO-PROMOTE CLAIM

Cruz contends that the district court erred as a matter of law in concluding that he failed to establish a prima facie case of disparate treatment. We disagree.

**The Honorable Samuel P. King, United States District Judge for the District of Hawaii, sitting by designation.

Although certain portions of the transcript of the oral hearing on the Rule 52(c) motion support Cruz's position, after an independent review of the record we conclude that the district court's written finding that "Mr. Cruz presented no evidence that either race or national origin was a factor in Mr. Cruz's not receiving the...promotion," adequately supports the court's judgment. Cf. Kern Oil & Refining Co. v. Tenneco Oil Co., 792 F.2d. 1380, 1385-86 (9th.Cir. 1986) (noting that although a district court's findings are reviewed for clear error even where the court adopts a party's proposed findings verbatim, "'close scrutiny' of the record is appropriate" in such circumstances) (internal citation omitted), cert. denied, 480 U.S. 906 (1987).

At the oral hearing on the Rule 52(c) motion, the DCAA asserted that Cruz's failure-to-promote claim should be dismissed because Cruz had not "shown that he's more qualified for the position than Louis Bowers [the individual who was promoted]." After counsel for Cruz claimed that no such showing was required to establish a prima facie case, the court emphasized that "[Cruz is] not the only qualified applicant here. There are [seven]." The court appears to have accepted the employer's contention that a plaintiff in a failure-to-promote case must show that he or she was better qualified than the person who was promoted. If it were clear that the district court had accepted the DCAA counsel's argument and had based its ruling solely on Cruz's failure to

establish that he was better qualified than Bowers, we would have to reverse. We know of no disparate treatment cases imposing such a requirement. The test, rather, is whether the plaintiff has offered evidence sufficient to "'give rise to an inference of unlawful discrimination.'" Yartzoff v. Thomas, 809 F.2d. 1371, 1373 (9th.Cir. 1987) (quoting Texas Dept. of Community affairs v. Burdine, 450 U.S. 248, 253 (1981)). This burden can be met in a variety of ways, and the mere fact that a plaintiff who was denied a promotion cannot show that he was "more qualified" than the individual who received the promotion does not necessarily preclude him from successfully raising an inference of discrimination.

We uphold the district court's decision, however, because we agree that the evidence offered by Cruz failed to give rise to such an inference. It is true, as "Cruz emphasizes, that he introduced evidence showing that he was a member of a class protected by Title VII, that he was among those qualified for the promotion, and Bowers, a white male with roughly comparable qualifications, obtained the promotion. Cruz, however, introduced no evidence tending to show that the decision impermissibly was based on national origin or race. See Hagans v. Clark, 752 F.2d. 477, 481-82 & n.1 (9th.Cir. 1985) (stating that, in the sex discrimination context, regardless of whether the plaintiff has shown that a similarly qualified person of the opposite sex achieved the position, the plaintiff meets his or her prima facie case only by raising an inference that sex-based

discrimination likely motivated the promotion decision). There is no direct evidence of discriminatory motivation in the record and the circumstantial evidence introduced by Cruz actually undermines his contention that the DCAA's decision was discriminatory. Cruz testified that, as a general matter, DCAA employees who work in the Field Detachment, such as himself, are at a significant disadvantage when it comes to promotions. He also conceded that the only other Filipino to have applied for a GM-14 position, Zennie Pangilinan, had been promoted to such a position two years previously. Although these latter facts alone would not be sufficient to defeat an inference of discrimination if the inference were supported by other evidence, the record here is entirely devoid of such evidence.

II RETALIATION CLAIM

Cruz contends that the district court erred in concluding that he failed to establish a prima facie case of retaliation. We agree.

"A plaintiff may establish a prima facie case of retaliation by showing that (1) he engaged or was engaging in activity protected under Title VII, (2) the employer subjected him to an adverse employment decision, and (3) there was a causal link between the protected activity and the employer's action." Yartzoff v. Thomas, 809 F.2d. 1371, 1375 (9th.Cir. 1987). There is no question that Cruz's decision to file an EEOC complaint is a protected activity under Title VII. Cruz also established that his performance

rating dropped for the first time ever within months of filing the complaint, thereby carrying his burden of showing that he suffered an adverse employment decision. See id. at 1376 (stating that a performance rating drop constitutes an adverse employment decision within the meaning of Title VII). The only remaining question is whether Cruz's evidence established the necessary causal link between his EEOC filing and the adverse evaluation.

At the oral hearing on the Rule 52(c) motion, the district court suggested that Cruz's only evidence of a causal link was that Warren Wright, Cruz's immediate supervisor, had raised his voice against him. The court also suggested that it did not believe the testimony of Rogers, who had testified that Wright was out to get Cruz. The court did not, however, question the credibility of Cruz or of any of his other witnesses. In its written concludions of law, the court mentions only Wright's alleged "yelling" and the alleged impropriety of the investigation by the Inspector General's office. Cruz's evidence, however, was far more extensive. We conclude that, even disregarding the evidence discounted by the district court, that evidence establishes the causal link necessary to give rise to an inference of unlawful retaliation.

Cruz testified that, immediately after filing the EEOC complaint, he informed Wright of his action. Cruz claimed that Wright told him that he "didn't have any leg to stand on" and suggested that his rating could decrease

as a result of having filed the complaint. Cruz also detailed what he described as unusually close supervision from Wright and his successor and a pattern of retaliatory harassment in the ensuing months. He explained that, within two or three months of his filing of the complaint, Wright had his unit perform a special, time-consuming "floor check" despite considerable time pressure to finish scheduled audits. He further claimed that Wright gave conflicting instructions to him and the people working under him. He noted that one auditor was transferred out for 3-4 weeks in June 1991 and that another was transferred out permanently in July, leaving his unit shorthanded Finally, Cruz introduced evidence tending to show that his performance rating decrease was arbitrary. He testified that, prior to the filing of his EEOC complaint, Wright had given him a superior rating. He also testified that his rating was decreased despite the fact that he had completed 31 of 41 scheduled audits, whereas Roger Samuel, another supervising auditor at El Segundo who completed only 608 of 40 audits, did not have his rating decreased.

Under established Ninth Circuit precedent, this evidence suffices to establish the final element of Cruz's prima facie case of retaliation. See Yartzoff, 809 F.2d. at 1356 ("Causation sufficient to establish the third element of the prima facie case may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected

action and the allegedly retaliatory employment decision."). Accordingly, we reverse the district court's judgment in favor of the DCAA on Cruz's retaliation claim and remand the case to the district court. On remand, the DCAA should have the opportunity to present legitimate, nondiscriminatory reasons for its challenged actions. If it does so, Cruz must be afforded an opportunity to show that those reasons were pretextual and that the DCAA's actions were based on impermissible considerations. See St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993).

III. JURY TRIAL

The Supreme Court's decision in Landgraf v. UDI Film Products, 114 S.Ct. 1483 (1994), forecloses Cruz's claim that he was entitled to a jury trial. Cruz concedes that the jury trial provision of the Civil Rights Act of 1991 would be applicable in this case only if the provision applies retroactively. In Landgraf, decided after the briefs were filed, the Supreme Court expressly ruled that the provision, set forth in §102 of the Act, does not apply retroactively.[2]

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[2] In his "Notice of New Authority," filed on May 27, 1994, Cruz makes the argument that "the rule [set forth in Landgraf] does not apply to cases arising in California." This argument borders on the frivolous. Cruz has presented no basis upon which this court conceivably could distinguish Landgraf.

(2)

Supreme Court, U.S.
FILED

Case No. 98 246 JUL 17 1998

OFFICE OF THE CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term 1997

FELIPE B. CRUZ,
Petitioner,

vs.

WILLIAM S. COHEN,
Secretary, Department of
Defense, USA,
Respondent.

Volume II
Petitioner's Supplemental Appendix

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Attorneys for Defendants
William Perry and United States of America

Entered January 7, 1997
Clerk, U.S. District Court
Central District of California
By Deputy

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FELIPE B. CRUZ, Plaintiff,	)	No. CV 96-1572-R (CTx)
v.	)	Date: Dec. 16, 1996
	)	Time: 10:00 a.m.
WILLIAM PERRY, DEPT. OF DEFENSE; U.S.A., Defendants.	)	

PARTIAL SUMMARY JUDGMENT IN FAVOR DEFENDANT WILLIAM PERRY, SECRETARY OF DEFENSE AND SUMMARY JUDGMENT IN FAVOR OF DEFENDANT UNITED STATES OF AMERICA

The motion of defendant William Perry, Secretary of Defense for partial summary judgment, and defendant United States of America for summary judgment came on for hearing on December 16, 1996, before the Honorable Manuel Real, United States District Judge. Defendants were represented by Nora M. Manella, United States Attorney, Leon W. Weidman, Assistant United States Attorney, Chief, Civil Division, through Robert I. Lester, Assistant United States Attorney. Plaintiff Felipe Cruz appeared in pro se.

After consideration of the papers submitted by the parties, as well as the argument advanced at the hearing, and in accordance with the Statement of Uncontroverted Facts and Conclusions of Law which is being filed with this judgment,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that summary judgment is entered in favor of Secretary Perry and against plaintiff as to the following claims:

1. That Cruz's supervisor had placed Cruz on three-day administrative leave for improperly submitting three audit reports to an EEO investigator, and had barred Cruz during that time from entering the office.

2. That Cruz had been suspended for five days without pay, as of October 17, 1994.

3. That Cruz was transferred to an office 42 miles from his home.

4. After Cruz filed his first EEO Complaint, his supervisor, Warren Wright, warned him that his (Cruz's) ratings would decrease, and in fact his rating as of September 1991 did decrease from 82 to 76.

5. That the DCAA had induced Russell Morimoto to apply for the GM-14 position that he received in 1991 (instead of Cruz).

6. That Russell Morimoto, his new supervisor in October 1991, told Cruz that he (Morimoto) was adding "two more responsibilities" to Cruz. Cruz asked Morimoto whether he was being influenced by Warren Wright (Cruz's previous supervisor).

7. That in April, 1992, Morimoto gave Cruz a letter of reprimand for a security violation for the letter Cruz had sent to the head of DPRO.

8. That Morimoto transferred Cruz to the DCAA's Redondo Beach office, with only two days notice.

9. While Cruz worked at the Redondo Beach office, his security clearance was removed, which limited his access to his office, and that sometimes he had to wait in his car in the morning until another person arrived, because he was not allowed into the office by himself.

10. That Cruz's ratings decreased again in 1992, to 75, and that his supervisor was being influenced by someone in Washington.

11. Cruz's age discrimination claim.

IT IS FURTHER ORDERED that summary judgment is entered as to all claims in favor of the United States of America and against plaintiff.

DATED: Jan. 6, 1997.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

Presented by:

NORA M. MANELLA
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

ROBERT I. LESTER
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Entered January 7, 1997
Clerk, U.S. District Court
Central District of California
By Deputy

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FELIPE B. CRUZ, Plaintiff,	No. CV 96-1572-R (CTx)
v.	Date: Dec. 16, 1996 Time: 10:00 a.m.
WILLIAM PERRY, DEPT. OF DEFENSE; U.S.A., Defendants.	

STATEMENT OF UNCONTROVERTED FACTS
AND CONCLUSIONS OF LAW

The motion of defendant William Perry, Secretary of Defense for partial summary judgment, and defendant United States of America for summary judgment came on for hearing on December 16, 1996, before the Honorable Manuel Real, United States District Judge. Defendants were represented by Nora M. Manella, United States Attorney, Leon W. Weidman, Assistant United States Attorney, Chief, Civil Division, through Robert I. Lester, Assistant United States Attorney. Plaintiff Felipe Cruz appeared in pro se.

After consideration of the papers submitted by the parties, as well as the argument advanced at the hearing, the Court hereby finds as follows:

STATEMENT OF UNCONTROVERTED FACTS

1. Plaintiff brought this action pursuant to Title VII of the Civil Rights Act of 1991 and the Age Discrimination in Employment Act.

2. In Cruz v. Aspin, Case No. CV 92-3109-R, aff'd in part, reversed in part, 35 F.3d 570 (9th Cir. 1994) (unpublished decision), cert. denied, --- U.S.---, 115 S.Ct. 1093, 130 L.Ed.2d 1062 (1995) ("Cruz 1"), plaintiff Felipe Cruz sued the Defense Contract Audit Agency ("DCAA"), a component of the Department of Defense, for employment discrimination pursuant to Title VII of the Civil Rights Act of 1964. In that case, Cruz alleged that he had been unlawfully denied a promotion to a GM-14 Field Office Manager position in 1991 based on race (Asian) or national origin (Filipino). Cruz alsc

alleged that after he had filed a charge of discrimination for the non-promotion in March 1991, he was subjected to a variety of acts of retaliation.

3. Cruz 1 was tried to the bench in 1993. After the close of Cruz's case-in-chief, this Court found in favor of the DCAA, pursuant to the DCAA's Fed.R.Civ.P. 52(c) motion. In an unpublished decision, the Ninth Circuit affirmed the decision of this Court as to the 1990 promotion claim, but remanded the retaliation claims for retrial. The Ninth Circuit emphasized that while the DCAA had put on evidence which rebutted Cruz's testimony that his supervisor had yelled at him in retaliation for Cruz's March 1991 EEO Complaint, the DCAA had not, however, put on evidence to rebut the "far more extensive" testimony offered by Cruz and his other witnesses as to other instances of retaliation. The Ninth Circuit cited to testimony that Cruz's ratings were decreased after he filed the EEO Complaint, and to unusually close supervision from one of his supervisors (Russell Morimoto). Because Cruz had made a prima facie case of retaliation at trial, the DCAA would have to put on evidence regarding the retaliation claims on remand.

4. Prior to retrial of the retaliation claims, however, Cruz and the DCAA settled the case in 1995 as to all claims that had given rise to the lawsuit in Cruz 1.

5. On November 10, 1994, Cruz filed an EEO Complaint alleging that his supervisor had placed Cruz on three-day administrative leave for improperly submitting three audit reports to an EEO investigator, and had barred Cruz during that time from entering the office. That EEO Complaint was given DCAA case number 95-01(1).

6. On November 10, 1994, Cruz filed a second EEO Complaint alleging that he had been suspended for five days without pay, as of October 17, 1994. This EEO Complaint was given DCAA case number H95-01(2).

7. On December 20, 1994, the DCAA accepted for investigation the November 10, 1994 EEO Complaints concerning the two suspensions. In that letter, case numbers H95-01(1) and H95-01(2) were referred to jointly as case number H95-01.

8. On February 27, 1995, Cruz signed a declaration under penalty of perjury in which he stated: "It is my decision to withdraw my complaint of discrimination dated 10 November, 1994, DCAA Case No. H95-01, inasmuch as I can see no useful purpose in any further processing of my complaint." That declaration was given to the DCAA. Accordingly, the DCAA considered case number H95-01 closed. Cruz never sought to reopen H95-01.

9. In the Complaint in the instant action, Cruz alleges that in that same EEO Complaint (H95-01), he also complained that he was being transferred to an office

42 miles from his home. Cruz is incorrect. He did not file an EEO Complaint as to the 42-mile claim in DCAA case number H95-01(1), or at any time, and such purported 42-mile transfer claim was not accepted for investigation. To the extent that he raised the 42-mile transfer in H95-01, when he withdrew H95-01, he necessarily withdrew any claim he had with regard to the 42-mile transfer.

10. During trial in Cruz 1, Cruz and his witnesses testified as to a variety of alleged acts by DCAA personnel in retaliation for his having filed an EEO Complaint in March 1991; yet Cruz complains of these same alleged events in the Complaint in the instant action:

a. After Cruz filed his first EEO Complaint, his supervisor, Warren Wright, warned him that his (Cruz's) ratings would decrease, and in fact his rating as of September 1991 did decrease from 82 to 76.

b. Witness Edward B. Rooths testified concerning Cruz's claim that the DCAA had induced Russell Morimoto to apply for the GM-14 position that he received in 1991 (instead of Cruz).

c. Russell Morimoto, his new supervisor in October 1991, told Cruz that he (Morimoto) was adding "two more responsibilities" to Cruz. Cruz asked Morimoto whether he was being influenced by Warren Wright (Cruz's previous supervisor).

d. In April 1992, Morimoto gave Cruz a letter of reprimand for a security violation for the letter Cruz had sent to the head of DPRO.

e. Morimoto transferred Cruz to the DCAA's Redondo Beach office, with only two days notice.

f. While Cruz worked at the Redondo Beach office, his security clearance was removed, which limited his access to his office. Sometimes he had to wait in his car in the morning until another person arrived, because he was not allowed into the office by himself.

g. Cruz's ratings decreased again in 1992, to 75. Cruz then complained to his supervisor, who said that "he had a discussion in Washington." Cruz accused the supervisor of "'being influenced by Headquarters'." Cruz's supervisor responded: "'If Headquarters will go after us, you know pretty well that I will be saving my hide.'" Cruz then responded "'Okay. So you are then being influenced.'"

11. While not a model of clarity, the Complaint appears to allege that although Cruz has been a "referred candidate," for many years he did not receive serious consideration for promotion due to his age. DCAA EEO Complaint H94-1, however, does not make that complaint. Instead, the only issue that the DCAA accepted for investigation for H94-1 was whether the promotion appraisal score Cruz had received on October 27, 1993 was lower than he

deserved on account of his age or because of reprisal.

12. To the extent that any of the foregoing Uncontroverted Facts are deemed to be conclusions of law, they are incorporated into the following Conclusions of Law.

CONCLUSIONS OF LAW

1. There is no genuine issue of material fact concerning the claim that defendant Secretary of Defense is entitled to judgment in this Court as against plaintiff as to the issues described in paragraphs 4 - 7 below.

2. Under Fed.R.Civ.P. 56, the moving party "bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). To overcome a motion for summary judgment, a party opposing the motion may not rest on the mere allegations of his pleadings. Valandingham v. Bojorquez, 866 F.2d 1135, 1142 (9th Cir. 1989). Moreover, it is not enough for the opposing party to show that a dispute exists over some issue of fact. Rather, the dispute must be material and genuine. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

3. To establish a genuine triable

issue as to an element on which the nonmoving party will bear the burden of proof at trial, that party must come forward with affirmative evidence sufficient to justify a judgment in his favor. Anderson, 477 U.S. at 249. The evidence relied on to demonstrate a genuine factual dispute (and therefore a need for trial) must be of such a caliber that "a fair-minded jury could return a verdict for the [non-moving party] on the evidence presented." Id. at 252. If the opposing party fails to produce such evidence as to the asserted triable issue, summary judgment is required. Id.

4. Cruz voluntarily withdrew from the administrative process his claim that his supervisor had placed Cruz on three-day administrative leave for improperly submitting three audit reports to an EEO investigator, and had barred Cruz during that time from entering the office, and that he had been suspended for five days without pay, as of October 17, 1994. These claims had been made in DCAA case number 95-01(1). Because Cruz withdrew these claims from the administrative process, he cannot press them here. See Rivera v. United States Postal Service, 830 F.2d 1037, 1039 (9th Cir. 1987), cert. denied, 486 U.S. 1009, 108 S.Ct. 1737, 100 L.Ed.2d 200 (1988) (affirming dismissal of claim of plaintiff who failed to fully exhaust his administrative remedies when he "cancelled" his EEOC appeal prior to a final decision being rendered). See also Vinieratos v. United States, Department of Air Force, 939 F.3d 762, 769-72 (9th Cir. 1991).

5. Cruz cannot proceed with his claim that he was transferred 42 miles from his house. He did not make that claim in DCAA case number H95-01, or at any time. Nor did the DCAA, when it accepted the two November 10, 1994 EEO Complaints for investigation even make a reference to a claim of transfer. Thus, Cruz did not exhaust the 42-mile transfer claim. In any event, Cruz withdrew his EEO Complaints (H95-01) regarding the administrative leave and the suspension. Cruz alleges in the instant action that: "the complaint [H95-01] also included DCAA's action of transferring Cruz to the Western Region, about 42 miles away from Cruz's residence." Comp. ¶ 21(f). When Cruz withdrew DCAA EEO Complaint H95-01 on February 27, 1995, he necessarily withdrew his claim regarding the 42-mile transfer. Having withdrawn that claim, he cannot press it in this case.

6. Cruz raised a number of issues regarding retaliation at trial in Cruz 1. After the Ninth Circuit reversed and remanded for retrial, however, the parties settled the action as to all claims that gave rise to Cruz 1. Therefore, Cruz may not assert the following claims about which he raised in Cruz 1:

a. After Cruz filed his first EEO Complaint, his supervisor, Warren Wright, warned him that his (Cruz's) ratings would decrease, and in fact his rating as of September 1991 did decrease from 82 to 76.

b. The DCAA has induced Russell Morimoto to apply for the GM-14

position that he received in 1991 (instead of Cruz).

c. Russell Morimoto, his new supervisor in October 1991, told Cruz that he (Morimoto) was adding "two more responsibilities" to Cruz. Cruz asked Morimoto whether he was being influenced by Warren Wright (Cruz's previous supervisor).

d. In April 1992, Morimoto gave Cruz a letter of reprimand for a security violation for the letter Cruz had sent to the head of DPRO.

e. Morimoto transferred Cruz to the DCAA's Redondo Beach office, with only two days notice.

f. While Cruz worked at the Redondo Beach office, his security clearance was removed, which limited his access to his office. Sometimes he had to wait in his car in the morning until another person arrived, because he was not allowed into the office by himself.

g. Cruz's ratings decreased again in 1992, to 75. Cruz then complained to his supervisor, who said that "he had a discussion in Washington." Cruz accused the supervisor of "'being influenced by Headquarters.'"

7. In the instant action, Cruz apparently alleges that although he was a "referred candidate," his promotion applications were denied because of his age. However, DCAA EEO complaint H94-1, the only EEO complaint to assert age

discrimination, does not make that complaint. Instead, the only issue that the DCAA accepted for investigation for H94-1 was whether the promotion appraisal score Cruz had received on October 27, 1993 was lower than he deserved on account of his age or because of reprisal. To the extent Cruz is now complaining of age discrimination as to the 1991 promotion opportunity, the statute of limitations for bringing an EEO Complaint based on age discrimination has long expired. If Cruz claims that he did not get selected for a promotion in the 1993-1994 time frame -- the only time frame in which the October 1993 appraisal would have been used -- he has not alleged in the Complaint in this action that he had applied for such a promotion and that it was denied him.

8. There is no genuine issue of material fact concerning the claim that defendant United States is entitled to judgment in this Court as against plaintiff as to all issues. The United States is not a proper party in a title VII or age discrimination case. 42 U.S.C. §2000e-16(c). Cf. 29 C.F.R. §1614.201 (age discrimination case must be filed against the head of the alleged discriminating agency).

9. Because there is no genuine issue of material fact remaining, partial summary judgment will be entered in favor of defendant Secretary of Defense as to the issues specified above, and summary judgment as to all issues in favor of defendant United States.

10. To the extent that any of the foregoing Conclusions of Law are deemed to be statements of uncontroverted fact, they are incorporated into the foregoing Statement of Uncontroverted Facts.

IT IS SO ORDERED.

DATED: _____.

_____
UNITED STATES DISTRICT JUDGE

Presented by:

NORA M. MANELLA
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

_____
ROBERT I. LESTER
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Attorneys for Defendant
William Perry, Secretary of Defense

Filed February 3, 1997
Clerk, U.S. District Court
Central District of California
By Deputy

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FELIPE B. CRUZ, Plaintiff,	No. CV 96-1572-R (CTx)
v.	DATE: Feb. 3, 1997
WILLIAM PERRY, SECRETARY, DEPT. OF DEFENSE, U.S.A.,	TIME: 10:00 a.m.
Defendant.	

PARTIAL SUMMARY JUDGMENT IN FAVOR DEFENDANT WILLIAM PERRY, SECRETARY OF DEFENSE

The motion of defendant William Perry, Secretary of Defense for partial summary judgment, came on for hearing on February 3, 1997, before the Honorable Manuel Real, United States District Judge. Defendant was represented by Nora M. Manella, United States Attorney, Leon W. Weidman, Assistant United States Attorney, Chief, Civil Division, through Robert I. Lester, Assistant United States Attorney. Plaintiff Felipe Cruz appeared in pro se.

After consideration of the papers submitted by the parties, as well as the argument advanced at the hearing, and in accordance with the Statement of Uncontroverted Facts and Conclusions of Law which is being filed with this judgment,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that partial summary judgment is entered in favor of Secretary Perry and against plaintiff as to any and all of plaintiff's claims concerning the performance appraisal and promotion appraisal ratings that he received from the DCAA for the period October 1, 1993 to September 30, 1994.

DATED: February 3, 1997.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

Presented by:

NORA M. MANELLA
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

ROBERT I. LESTER
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Attorneys for Defendants
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Filed February 3, 1997
Clerk, U.S. District Court
Central District of California
By Deputy

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FELIPE B. CRUZ, Plaintiff,	)	No. CV 96-1572-R (CTx)
v.	)	Date: Feb. 3, 1997 Time: 10:00 a.m.
WILLIAM PERRY, DEPT. OF DEFENSE; U.S.A., Defendants.	)	

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP RULE 77(d).

The motion of defendant William Perry, Secretary of Defense for partial summary judgment came on for hearing on February 3, 1997, before the Honorable Manuel Real, United States District Judge. Defendant was represented by Nora M. Manella, United States Attorney, Leon W. Weidman, Assistant United States Attorney, Chief, Civil Division, through Robert I. Lester, Assistant United States Attorney. Plaintiff Felipe Cruz appeared in pro se.

After consideration of the papers submitted by the parties, as well as the argument advanced at the hearing, the Court hereby finds as follows:

STATEMENT OF UNCONTROVERTED FACTS

1. Plaintiff brought this action pursuant to Title VII of the Civil Rights Act of 1991 and the Age Discrimination in Employment Act.

2. The parties settled Cruz v. Aspin, Case No. CV 92-3109-R, aff'd in part, reversed in part, 35 F.3d 570 (9th Cir. 1994) (unpublished decision), cert. denied, ---U.S.---, 115 S.Ct. 1093, 130 L.Ed.2d 1062 (1995) ("Cruz 1"), in 1995. The Statement of Uncontroverted Facts and Conclusions of Law entered on or about January 7, 1997 which discuss the history of the litigation in Cruz 1, and its settlement in 1995, are incorporated by this reference.

3. Specifically, pursuant to the settlement in Cruz 1, Cruz received (1) $15,000.00, and (2) an increase of his performance appraisal and promotion

appraisal ratings for the period October 1, 1993 to September 30, 1994 -- back to the levels that they were for the fiscal year ending September 30, 1990.

4. One of Cruz's claims in the instant action is that he received performance appraisal and promotion appraisal ratings for the period of October 1, 1993 to September 30, 1994 that were too low, in retaliation for his allegedly protected EEO activities.

5. The 1995 settlement agreement in Cruz 1 explicitly remedied Cruz's claim regarding his 1994 fiscal year ratings, by providing him monetary compensation and, more importantly, by raising his ratings for the 1994 fiscal year to the levels they were at for the 1990 fiscal year -- before Cruz began his protected EEO activities. That is, pursuant to the 1995 settlement agreement, Cruz's performance appraisal rating for the 1994 fiscal year was increased from 195 to 230, and his promotion appraisal rating was increased from 70 to 82.

6. To the extent that any of the foregoing Uncontroverted Facts are deemed to be conclusions of law, they are incorporated into the following Conclusions of Law.

CONCLUSIONS OF LAW

1. There is no genuine issue of material fact concerning the claim that defendant Secretary of Defense is entitled to judgment in this Court as against plaintiff as to any and all claims that Cruz's 1994 fiscal year performance appraisal and promotion appraisal ratings were too low.

2. Under Fed.R.Civ.P. 56, the moving party "bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). To overcome a motion for summary judgment, a party opposing the motion may not rest on the mere allegations of his pleadings. Valandingham v. Bojorquez, 866 F.2d 1135, 1142 (9th Cir. 1989). Moreover, it is not enough for the opposing party to show that a dispute exists over some issue of fact. Rather, the dispute must be material and genuine. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

3. To establish a genuine triable issue as to an element on which the nonmoving party will bear the burden of proof at trial, that party must come forward with affirmative evidence sufficient to justify a judgment in his favor. Anderson, 477 U.S. at 249. The evidence relied on to demonstrate a

genuine factual dispute (and therefore a need for trial) must be of such a caliber that "a fair-minded jury could return a verdict for the [non-moving party] on the evidence presented." Id. at 252. If the opposing party fails to produce such evidence as to the asserted triable issue, summary judgment is required. Id.

4. There is no genuine issue of material fact concerning the claim that the Secretary is entitled to partial judgment in this Court as against plaintiff as to any and all claims that Cruz's 1994 fiscal year performance appraisal and promotion appraisal ratings were too low. Cruz was amply compensated by the $15,000 settlement, and more importantly, settlement restored Cruz's 1994 fiscal year performance appraisal and promotion potential ratings to the ratings he had been given for the 1990 fiscal year.

5. Because there is no genuine issue of material fact remaining, partial summary judgment will be entered in favor of defendant Secretary of Defense as to any and all claims that Cruz's 1994 fiscal year performance appraisal and promotion appraisal ratings were too low.

6. To the extent that any of the foregoing Conclusions of Law are deemed to be statements of uncontroverted fact, they are incorporated into the foregoing Statement of Uncontroverted Fact.

IT IS SO ORDERED.

DATED: February 3, 1997

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

Presented by:

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United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

ROBERT I. LESTER
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Entered March 26, 1997
Clerk, U.S. District Court
Central District of California
By Deputy

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FELIPE B. CRUZ, Plaintiff,	)	No. CV 96-1572-R (CTx)
v.	)	Date: Feb. 25, 1997
	)	Time: 9:00 a.m.
WILLIAM S. COHEN, SECRETARY, DEPT. OF DEFENSE,U.S.A. Defendants.	)	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

This case was tried on February 25, 1997, before the Honorable Manuel L. Real, United States District Judge. Appearances were: For plaintiff, Felipe B. Cruz, in pro se; for Defendant, Nora M. Manella, United States Attorney, Leon W. Weidman, Assistant United States Attorney, Chief, Civil Division, by Robert I. Lester, Assistant United States Attorney.

Having heard the testimony of the witnesses, having studied the documentary evidence, and having given the matter due consideration, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

INTRODUCTION

1. This is an action brought by plaintiff Felipe B. Cruz against defendant William S. Cohen, Secretary, Department of Defense (having succeeded William Perry as the Secretary of Defense). Mr. Cruz's claims are for unlawful reprisal under Title VII, 42 U.S.C. §2000e, et. seq., and for age discrimination, pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §633a.

2. Mr. Cruz submitted timely EEO Complaints that his performance appraisal rating for the period October 1, 1991 to February 28, 1992 and his promotion potential rating for the period October 1, 1992 to September 30, 1993 were lower than they should have been on account of unlawful reprisal for Mr. Cruz's participation in previous EEO-protected

activities, and that his promotion potential rating for the period October 1, 1992 to September 30, 1993 was lower than it should have been on account of unlawful age discrimination.

STIPULATED FACTS

3. Mr. Cruz was born in the Philippines.

4. Mr. Cruz began his employment with the Defense Contact Audit Agency ("DCAA") in January 1, 1978 as a GS-07.

5. The DCAA audits Government contractors. The Field Detachment differs from the "regular" DCAA in that the auditors in the Field Detachment perform audits of those contracts which require compartmentalized security clearances. One area of particular sensitivity in the Field Detachment is the association of the DCAA with specific contractors, customers, or products.

6. Mr. Cruz has been actively participating in EEO-protected activities since March 1991.

7. Mr. Cruz's performance appraisal and promotion potential ratings are set forth, beginning with Fiscal Year ("FY") 1990, during which Mr. Cruz made his first EEO Complaint:

Period Ending	Promotion Potential	Performance Appraisal	Rater
Sept. 1990	82	230	Wright
Sept. 1991	78	210	Wright
Feb. 1992	78	200	Morimoto
Sept. 1992	75	200	McGrath
Sept. 1993	75	220	McGrath

8. For the DCAA, the Performance Appraisal Ratings are interpreted as follows:

Level	Points
Outstanding	270-300
Exceeds Fully Successful	200-269
Fully Successful	100-199
Minimally Successful	50-99
Unacceptable	0-49

PERFORMANCE APPRAISAL RATING FOR THE PERIOD OCTOBER 1, 1991 TO FEBRUARY 28, 1992

9. From October 1, 1991 to February 28, 1992, the Resident Auditor (GM-14) of Mr. Cruz's office was Russell Morimoto. Another GM-13 Supervisory Auditor with auditors on her team at that office was Michele Chamberlain (now Michele Ellis).

10. When Mr. Morimoto became the GM-14 Resident Auditor of the office, he was told that Mr. Cruz had filed an EEO Complaint against the DCAA.

11. Ordinarily, when mid-term reviews are given, they are informal and the reviewer does not give a specific numerical rating, as is done at the end of

each fiscal year. However, because Mr. Cruz was transferred to another Field Detachment Office as of March 1, 1992, Mr. Morimoto was required to give Mr. Cruz a performance appraisal rating.

12. The DCAA's performance appraisal form provided several "job elements." Mr. Morimoto gave Mr. Cruz the same ratings that Warren Wright (the previous GM-14) had for FY 1991 in all ofthe job elements, except for job element number four: "Establish and Maintain Working Relationships Inside and Outside DCAA." For that job element, Mr. Morimoto reduced Mr. Cruz from a four ("Outstanding") to a three ("Exceeds Fully Successful."). In Mr. Cruz's performance appraisal rating document, Mr. Morimoto explained: "Mr. Cruz has had difficulty in handling audit and security situations involving customer personnel and contractor personnel."

13. Certain aspects of the DCAA's Field Detachment operations are considered very sensitive, because they audit national security-level contracts. In job element number six ("Security"), Mr. Morimoto wrote: "Mr. Cruz has experienced several lapses in security for the period. He has been disciplined for the most recent incident." Job element six, however, has no points assigned to it, so Mr. Morimoto's criticism as to that job element had no effect of Mr. Cruz's numerical rating.

14. Mr. Morimoto testified that he had three reasons for reducing Mr. Cruz's performance appraisal rating for the period October 1, 1991 to February 28,

1992 by ten points from the rating Mr. Wright had given him for FY 1991.

15. The first reason was that during the October 1, 1991 to February 28, 1992, Mr. Cruz violated security. On or about February 13, 1992, Mr. Morimoto and Leroy Endo (his special assistant) met with Mr. Cruz. Mr. Cruz was told that he may have committed a security violation as to a letter that he had sent to a contractor on or about November 20, 1991. Mr. Cruz was told to do nothing about it while the matter was being investigated.

16. Mr. Cruz, however, disregarded this direction, and on or about that same day (February 13, 1992), Mr. Cruz sent three documents, with a handwritten note on one of the documents, to that DCAA office's contractor, the customer, and another government employee. (The note and documents were introduced in evidence with names and other words redacted; however, Mr. Cruz sent them out on February 13, 1992 without redactions.) Mr. Cruz did this without Mr. Morimoto's prior knowledge or permission.

17. Mr. Cruz's note said: "Per Russ Morimoto & Bob Brown, the following persons might have violated security on [word redacted]." (Mr. brown was Mr. Morimoto's supervisor.) Mr. Cruz's note then listed four persons and referred to the three documents that Mr. Cruz sent out on February 13, 1992.

18. Thus, Mr. cruz's note suggested that <u>the contractor, the customer, and the other Government employee</u> may have

committed security violations as to those three documents. Additionally, Mr. Cruz's note incorrectly implied that it was Mr. Morimoto and Mr. Brown who had made that tentative conclusion that the contractor, the customer, and the other Government employee had violated security.

19. The contractor or the customer notified Mr. Morimoto about the accusation, and stated that Mr. Cruz had violated their security regulations. More importantly, Mr. Morimoto considered (and ultimately the DCAA authorities concluded) that by sending out the note and the three documents on February 13, 1992, Mr. Cruz committed a security violation.

20. Mr. Morimoto had these acts, as well as others discussed below, in mind when he gave Mr. Cruz a rating as to job element numbers four and six. Mr. Morimoto did not limit the effect of Mr. Cruz's security violation to job element number six ("Security") because Mr. Cruz's security violation undermined the confidence of and interfered with the working relationship between the DCAA and the customer and contractor. (An example of a security violation that would fall under job element six only would be if a DCAA auditor left secured documents out on his desk; the contractor and customer would not be effected, because they would not be aware of such a security violation.)

21. The second reason that Mr. Morimoto reduced Mr. Cruz's performance appraisal ratings by ten points for the period October 1, 1991 to February 28,

1992 is that after an audit, Mr. Cruz wrote a memo confirming an exit conference with a contractor which implied that the contractor had essentially admitted to lying to the DCAA. After the contractor received a copy of the memo, it complained to Mr. Morimoto that the report was inaccurate. Mr. Morimoto concluded that the contractor's objection to Mr. Cruz's memo was justified.

22. The third reason that Mr. Morimoto reduced Mr. Cruz's performance appraisal rating for that time period is that Mr. Cruz notified a contractor that a particular contract had a "positive defective pricing" before he had reviewed all of the available files. That is, Mr. Cruz had determined during an audit, and notified the contractor -- before he had reviewed all of the files -- that a defense contractor had charged a customer (either a Government agency or other purchaser) over $2 million more than appropriate. Mr. Cruz did not tell Mr. Morimoto in advance that he was sending out the letter.

23. Subsequently, the customer notified Mr. Morimoto about the accusation, and said that this was an example of the customer's belief that the DCAA auditors did not know what they were doing. Mr. Morimoto concluded that probably more data needed to looked at. The DCAA went on to request further data, but the data never were produced. Mr. Morimoto concluded that the reason why the data never were produced was because the contractor, after having been notified by Mr. Cruz's letter that the DCAA at least

suspected that there was a problem with a particular contract or the contractor, probably withheld or destroyed any incriminating documents. As a result, the DCAA could not support a defective pricing determination as to that contract.

24. Mr. Cruz was not the only GM-13 whose rating Mr. Morimoto reduced from the previous year's ratings of Mr. Wright. Mr. Morimoto's performance appraisal rating for Michele Chamberlain, another GM-13 in that office, for FY 1992 was 25 points lower than the rating that Mr. Wright had given her for FY 1991. So far as Mr. Morimoto was aware, Ms. Chamberlain had not filed an EEO Complaint against the DCAA prior to when he rated her.

25. Mr. Cruz did not prove that the fact that Mr. Morimoto had a witness present during certain discussions with Mr. Cruz (Mr. Cruz had his own witness) had any effect on Mr. Morimoto's rating of Mr. Cruz.

26. Mr. Morimoto was not influenced by Gary Neil, the Director of the Field Detachment, when he (Mr. Morimoto) prepared Mr. Cruz's performance appraisal rating for the period October 1, 1991 to February 28, 1992. Neither did Mr. Morimoto take into account any opinion that he thought Mr. Neil may have had with respect to the performance appraisal rating that Mr. Morimoto should give Mr. Cruz.

27. No one at the DCAA told Mr. Morimoto to lower Mr. Cruz's performance appraisal rating on account of Mr. Cruz's

previous EEO activity. Moreover, there was no evidence presented at trial that Mr. Morimoto took Mr. Cruz's EEO activity into account, in any way, when he (Mr. Morimoto) prepared Mr. Cruz's performance appraisal rating.

PROMOTION POTENTIAL RATING FOR THE PERIOD OCTOBER 1, 1992 TO SEPTEMBER 30, 1993

28. Effective March 1, 1992, the DCAA transferred Mr. Cruz to another Field Detachment office, where the Resident Auditor (GM-14) of Cruz's office was Barry McGrath. Mr. McGrath remained Mr. Cruz's supervisor until after September 30, 1993.

29. When Mr. Cruz started working at the new office, without having been asked, he told Mr. Mcgrath that he had previously filed an EEO Complaint.

30. No one at the DCAA told Mr. McGrath to take into account Mr. Cruz's previous EEO activity when rating him.

31. Mr. McGrath gave Mr. Cruz a performance appraisal rating of 220 for the period October 1, 1992 to September 30, 1993 -- an increase of 20 points from the 200 rating that Mr. McGrath had given Mr. Cruz for FY 1992. Half of that increase was because Mr. McGrath gave Mr. Cruz an "Outstanding" for one job element, writing that "Mr. Cruz successfully meets and deals in face-to-face and telephonic situations to provide information, establish on-going relationships and resolve problems."

32. Mr. McGrath's promotion potential rating of 75 for Mr. Cruz for the period October 1, 1992 to September 30, 1993 was the same as the promotion potential rating that Mr. McGrath had given Mr. Cruz for FY 1992.

33. Mr. McGrath testified that he could not recall ever giving any GM-13 Supervisory Auditor a promotion potential rating higher than a 75. Mr. McGrath continued that he considers a promotion potential rating of 75 for a GM-13 to be very good. In fact, Mr. McGrath gave the other two GM-13s at his office a 75 or lower for their promotion potential ratings for FY 1993, even though Mr. McGrath opined that at least one if not both of those other two GM-13s would have performed better as a GM-14 than Mr. Cruz would.

34. For FY 1993, Mr. Cruz's 75 promotion potential rating placed him in the top third of all GM-13 auditors in the Field Detachment.

35. The DCAA's performance appraisal rating evaluates the auditor's work in the previous year; the promotion potential rating predicts how the auditor would succeed at the next higher job level. A change in an auditor's performance appraisal rating does not necessarily lead to a change in the auditor's promotion potential rating.

36. When Mr. McGrath prepared the FY 1993 ratings, he looked at Mr. Cruz's ratings for FY 1992 as a starting point.

(It is customary for a GM-14 to review the previous year's ratings when preparing to rate a GM-13.) After careful consideration, Mr. McGrath decided that Mr. Cruz did not merit an increase or a decrease in the promotion potential rating that Mr. McGrath had given Mr. Cruz the previous year.

37. Mr. Cruz was one of 18 (out of a possible 51) GM-13 auditors in the Field Detachment whose promotion potential ratings remained the same from FY 1992 to FY 1993. (The 17 other GM-13 auditors were Peters, Dececca, Lawrence, Luescher, Garrido, Gross, Noonan, Van Wyke, Millard, Duggan, Endo, Meonske, Picard, Olinger, Stewart, Hoffman, and Skeen.)

38. Mr. Cruz was one of the five GM-13 auditors (among the 18) whose performance appraisal ratings for FY 1993 increased, but whose promotion potential ratings remained the same. (The four other GM-13 auditors were Van Wyke, Millard, Olinger, and Skeen.)

39. For FY 1993, while Mr. Cruz's performance appraisal rating rose by 20 points, the performance appraisal ratings for seven of the 51 GM-13 auditors declined. (The seven were GM-13 auditors Peters, Luescher, Endo, Meonske, Stewart, Hoffman, and Beckstead.)

40. When Mr. Cruz arrived at Mr. McGrath's office, Mr. Cruz inherited an extremely capable team (with one exception), including GS-12 auditors Russell Brand and Jeff Lichtig. While Mr. Lichtig became more efficient and

productive at performing the Contract Audit Closing Statements (CACS's) as he worked for Mr. Cruz, the innovations were mostly generated by Mr. Lichtig (not by Mr. Cruz), and Mr. Lichtig continued to become even more efficient and productive after Mr. Cruz stopped being his supervisor.

41. Mr. McGrath was not influenced by Gary Neil, the Director of the Field Detachment, when he (Mr. McGrath) prepared Mr. Cruz's ratings for the period October 1, 1992 to September 30, 1993. Neither did Mr. Mcgrath take into account any opinion that he thought Mr. Neil may have had with respect to the ratings that Mr. McGrath should give Mr. Cruz.

42. There was no evidence presented at trial that Mr. McGrath took Mr. Cruz's EEO activity into account, in any way, when he (Mr. McGrath) prepared Mr. Cruz's ratings for the period October 1, 1992 to September 30, 1993.

43. There was no evidence that Mr. McGrath took Mr. Cruz's age into account, in any way, when Mr. McGrath prepared Mr. Cruz's ratings for the period October 1, 1992 to September 30, 1993.

44. To the extent Mr. Cruz accuses the upper management of the DCAA field Detachment of age discrimination with respect to his FY 1993 promotion potential rating, Mr. Cruz offered no facts in support of that accusation. First, Mr. Cruz offers no evidence that age was a factor in his FY 1993 promotion potential rating. Second, for FY 1993, there were

three GM-13s in the Field Detachment who were approximately Mr. Cruz's age (or older) who had higher promotion potential ratings than Mr. Cruz, and their ratings were not decreased for FY 1993. (These GM-13 auditors were Garrido, Gross, and Van Wyke.)

45. For FY 1993, of the 18 GM-13 auditors (including Mr. Cruz) whose promotion potential ratings remained the same, two of them were under 40 years of age as of October 1993, Mr. Peters and Mr. Stewart.

46. For FY 1993, of the seven GM-13 auditors whose performance appraisal ratings declined, Mr. Peters and Mr. Stewart were under 40 years of age as of October 1993.

47. Any Finding of Fact which is erroneously designated as a Conclusion of Law is incorporated herein by reference.

CONCLUSIONS OF LAW

1. This Court properly has jurisdiction under Title VII, 42 U.S.C. §2000e, et seq. for claims of unlawful reprisal as to Mr. Cruz's performance appraisal rating for the period October 1, 1991 to February 28, 1992 and his promotion potential rating for the period October 1, 1992 to September 30, 1993. This Court also properly has jurisdiction under 29 U.S.C. §633a, for Mr. Cruz's claim of unlawful age discrimination for his promotion potential rating for the period October 1, 1992 to September 30, 1993.

2. Retaliation for participation in lawful EEO activity is prohibited by 42 U.S.C. §2000e-3(a). Retaliation claims are included in the McDonnell Douglas[1] framework. Lam v. University of Hawaii, 40 F.3d 1551, 1559 n.11 (9th Cir. 1994); Miller v. Fairchild Industries, Inc., 885 F.2d 498, 504 n. 4 (9th Cir. 1989), cert.denied, 494 U.S. 1056, 110 S.Ct. 1524, 108 L.Ed.2d 764 (1990). Age discrimination claims also fit into that framework. Wallis v. J.R. Simplot Co., 26 F.3d 885, 888 (9th Cir. 1994).

3. A prima facie case of retaliation may be established if the plaintiff can demonstrate that (1) he or she engaged in protected activity, (2) he or she suffered an adverse employment decision, and (3) a causal link existed between his or her protected activity and the adverse employment decision. Yartzoff v. Thomas, 809 F.2d 1371, 1375 (9th Cir. 1987). To establish a causal link, the plaintiff must present sufficient evidence to raise the inference that the protected activity was the likely reason for the adverse action. Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th cir. 1982). For example, a causal link may be inferred from circumstantial evidence that the employer knew that the plaintiff engaged in the protected activity and from a closeness in time between the protected activity and the adverse employment action. Yartzoff, 809 F.2d at 1376.

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[1] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d (1973).

4. A plaintiff's conclusory statements that he or she has been retaliated against and his or her subjective personal judgment of his or her own competence, unsupported by any evidence, is insufficient to establish a prima facie case of reprisal. See Bradley v. Harcourt, Brace and Co., 104 F.3d 267 (9th cir. 1996).

5. Once the plaintiff has established a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. Once that occurs, the presumption of unlawful retaliation "simply drops out of the picture." See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993).

6. Once the defendant has articulated a legitimate, nondiscriminatory reason for its employment decision, the plaintiff must demonstrate that the employer's proffered reason for the adverse employment decision is a pretext for another motive that is retaliatory. See St. Mary's Honor Center v. Hicks, supra; Wallis v. J.R. Simplot Co., 26 F.3d 885, 889. To reach the fact finder, the plaintiff must do more than establish a prima facie case and deny the credibility of the defendant's witnesses. Wallis v. J.R. Simplot Co., 26 F.3d at 890. The plaintiff must produce specific, substantial evidence of pretext. Id. See, e.g., Nidds v. Schindler Elevator Corp., 103 F.3d 854 (9th Cir. 1996) (affirming summary judgment in favor of employer where the plaintiff did not offer

evidence such that a reasonable fact finder could conclude that the defendant's proffered reason was a pretext for unlawful retaliation).

7. Even if the fact finder rejects the proffered reason for the adverse employment action, the defendant does not "lose by default"; "The Supreme Court has stated that even if an employer's proffered reason is pretextual, victory is not handed to the plaintiff as punishment for the employer's 'fibbery.'" Gilligan v. Department of Labor, 81 F.3d 835, 839 (9th Cir. 1996) (citing St. Mary's Honor Center v. Hicks, 509 U.S. at 521-23, 113 S.Ct. at 2755). The plaintiff must show "both that the reason was false, and that [retaliation] was the real reason." St. Mary's Honor Center v. Hicks, supra. Thus, the plaintiff retains at all times the burden to show that the employer intentionally retaliated against the employee. See Gilligan v. Department of Labor, 81 F.3d at 839.

8. A plaintiff's showing of her supervisor's favoritism of a subordinate of the plaintiff over the plaintiff does not show pretext. Bradley v. Harcourt, Brace and Co., 104 F.3d 267 (9th cir. 1996). In Bradley, the plaintiff did not show that the favoritism stemmed from an improper motive as opposed to the subordinate's competence or performance, particularly in light of the plaintiff's inadequate performance during the same period. Id.

9. "Stray comments" unrelated to the decisional process are insufficient to

raise a triable issue of unlawful retaliation. See Merrick v. Farmers Insurance Group, 892 F.2d 1434, 1438 (9th Cir. 1990).

10. The Court finds that Mr. Cruz has made a prima facie case of reprisal, pursuant to Title VII, with regard to the reduction of his performance appraisal rating from 210 to 200 for the period October 1, 1991 to February 28, 1992.

11. The Court also finds that defendant has offered legitimate, non-retaliatory reasons for the slight reduction in Mr. Cruz's performance appraisal rating for that period. First, Mr. Morimoto was justified in concluding that Mr. Cruz's actions regarding his November 1991 letter and his February 13, 1992 actions, described in the Findings of Fact in ¶¶ 15-20, constituted a security violation.

12. Second, Mr. Morimoto was justified in criticizing Mr. Cruz for writing the memo confirming the exit conference which was described in the Findings of Fact in ¶ 21.

13. Finally, Mr. Morimoto was justified in criticizing Mr. Cruz for sending out the positive defective pricing memo which was described in the Findings of Fact in ¶ 22-23.

14. In response to these legitimate, non-retaliatory reasons for Mr. Morimoto's reducing Mr. Cruz's performance appraisal rating by 10 points for the period October 1, 1991 to February 28, 1992, Mr. Cruz has

offered no evidence that these reasons were pretextual and that the real reason (in whole or in part) was unlawful reprisal for Mr. Cruz's previous, EEO-protected activity. Mr. Cruz did not go beyond offering unsubstantiated speculation, supposition, and inadmissible hearsay as to pretext and the "real" reason why Mr. Morimoto reduced his performance appraisal rating from FY 1991 by 10 points for the period October 1, 1991 to February 28, 1992.

15. Assuming arguendo that Mr. Cruz did offer some evidence that defendant's reasons were pretextual and that unlawful reprisal was the true reason (in whole or in part) for performance appraisal rating for the period of October 1, 1991 to February 28, 1992, the Court finds that Mr. Cruz did not prove this by a preponderance of the evidence. Defendant's reasons for the reduction in Mr. Cruz's performance appraisal rating by 10 points, as set forth above, were specific, and the testimony of the defendant's witness, Mr. Morimoto, as to these reasons, was more credible.

16. As to Mr. Cruz's claim of unlawful reprisal as to Mr. McGrath deciding not to raise Mr. Cruz's promotion potential rating for FY 1993, the Court finds that Mr. Cruz did not make a prima facie case of title VII retaliation. No one employed at the DCAA made an "adverse employment decision" as to Mr. Cruz when Mr. McGrath decided not to raise Mr. Cruz's promotion potential rating for FY 1993. See Yartzoff v. Thomas, 809 F.2d 1371, 1375 (9th Cir. 1987). Mr. Cruz did

not offer any evidence that Mr. McGrath (or any of his superiors) considered that deciding not to raise Mr. Cruz's promotion potential rating for FY 1993 constituted any kind of reprisal or negative action against him.

17. Even assuming arguendo that Mr. Cruz has made out a prima facie case of reprisal as to his promotion potential rating for FY 1993, defendant has offered legitimate, non-retaliatory reasons for Mr. McGrath having decided not to raise Mr. Cruz's promotion potential rating for FY 1993. Mr. McGrath testified credibly that Mr. Cruz's performance appraisal during FY 1993 did not suggest to him that Mr. Cruz could more likely be expected to perform more successfully at a higher level (if promoted) than Mr. Cruz would have after the FY 1992 ratings were issued. While Mr. Cruz's team of auditors was productive, Mr. Cruz had inherited a very good team of auditors when he came to Mr. McGrath's office (including Russell Brand and Jeff Lichtig). Mr. Lichtig was responsible for most of the innovations as to the CACS's, not Mr. Cruz, and Mr. Lichtig continued to become even more efficient and productive after Mr. Cruz stopped working at that office.

18. In response to these legitimate, non-retaliatory reasons for Mr. McGrath deciding not to raise Mr. Cruz's promotion potential rating for FY 1993, Mr. Cruz has offered no evidence that these reasons were pretextual and that the real reason (in whole or in part) for the promotion potential rating for FY 1993 was unlawful reprisal for Mr. Cruz's previous, EEO-

protected activity. Mr. Cruz did not go beyond offering unsubstantiated speculation, supposition and hearsay as to the "real" reason why his promotion potential rating was not raised. Mr. Cruz's unsubstantiated claim that Mr. Mcgrath simply "copied over" Mr. Cruz's previous year promotion potential rating was not probative or material to Mr. Cruz's claim that Mr. McGrath gave him the same promotion potential rating for FY 1993 irrespective of Mr. Cruz's "merits."

19. Assuming arguendo that Mr. Cruz did offer some evidence that defendant's reasons were pretextual and that unlawful reprisal was the true reason (in whole or in part) for Mr. McGrath's deciding not to raise Mr. Cruz's promotion potential rating for FY 1993, the Court finds that Mr. Cruz did not prove this by a preponderance of the evidence.

20. Mr. McGrath raised Mr. Cruz's performance appraisal rating for the same period by 20 points (from 200 to 220) for the same period. Further, the reasons given by defendant as to Mr. McGrath's decision not to raise Mr. Cruz's promotion potential rating for FY 1993 were specific and credible. It was not unusual for GM-13 auditors' performance appraisal ratings to increase while leaving their promotion potential ratings remain the same. During the same year, this occurred as to four other GM-13 auditors at the DCAA's Field Detachment. Many of the GM-13 auditors had their promotion potential ratings stay the same from FY 1992 to FY 1993.

21. With respect to Mr. Cruz's claim of unlawful age discrimination based upon Mr. McGrath's decision not to raise Mr. Cruz's promotion potential rating for FY 1993, the Court finds that Mr. Cruz has not made out a prima facie case. For the reasons identified above, no one employed at the DCAA made an "adverse employment decision" as to Mr. Cruz when Mr. McGrath decided not to raise Mr. Cruz's promotion potential rating for FY 1993.

22. Even assuming arguendo that Mr. Cruz has made out a prima facie case of age discrimination as to his promotion potential rating for FY 1993, as set forth above, defendant has offered legitimate, non-retaliatory reasons for Mr. McGrath's decision not to raise Mr. Cruz's promotion potential rating for FY 1993.

23. In response to these legitimate, non-discriminatory reasons for Mr. McGrath's decision not to raise Mr. Cruz's promotion potential rating for FY 1993, as explained above, Mr. Cruz has offered no evidence that these reasons were a pretext and that the real reason (in whole or in part) was unlawful age discrimination.

24. Even assuming arguendo that Mr. Cruz did offer some evidence that defendant's reasons were pretextual and that unlawful age discrimination was a reason, for the reasons set forth in the discussion regarding unlawful reprisal for the FY 1993 rating, the Court finds that Mr. Cruz did not prove this by a preponderance of the evidence.

25. Based on the foregoing, the defendant is entitled to judgment as a matter of law as to Mr. Cruz's claim that Mr. Morimoto's lowering from 210 to 200 of Mr. Cruz's performance appraisal rating for the period October 1, 1991 to February 28, 1992 constituted unlawful reprisal under Title VII.

26. Based on the foregoing, the defendant is entitled to judgment as a matter of law as to Mr. Cruz's claim that Mr. McGrath's decision not to raise Mr. Cruz's promotion potential rating for FY 1993 constituted unlawful reprisal under Title VII.

27. Based on the foregoing, the defendant is entitled to judgment as a matter of law as to Mr. Cruz's claim that Mr. McGrath's decision not to raise Mr. Cruz's promotion potential rating for FY 1993 constituted age discrimination under 29 U.S.C. §633a.

28. Any Conclusion of Law erroneously designated as Finding of Fact is incorporated herein by reference.

DATED: MAR 17, 1997.

MANUEL L. REAL

UNITED STATES DISTRICT JUDGE

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Clerk, U.S. District Court
Central District of California
By Deputy

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FELIPE B. CRUZ, Plaintiff,	No. CV 96-1572-R (CTx)
v.	Date: Feb. 25, 1997
	Time: 9:00 a.m.
WILLIAM S. COHEN, SECRETARY, DEPT. OF DEFENSE, U.S.A., Defendant.	

JUDGMENT

This case was tried on February 25, 1997, before the Honorable Manuel L. real, United States District Judge, and the issues having been duly tried and a decision having been rendered,

IT IS ORDERED AND ADJUDGED that plaintiff take nothing, that the action be dismissed on the merits.

DATED; MAR 17, 1997.

MANUEL L. REAL

UNITED STATES DISTRICT JUDGE

Presented by:

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